

December 27, 1989

MEMORANDUM

TO: The Honorable Jeanette C. Takamura, Ph.D.
Director, Executive Office on Aging

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: Public Access to Statements of Deficiencies and Plans
of Correction Maintained by the Department of Health
Relating to Adult Residential Care Home Facilities

This is in reply to your letter dated September 27, 1989, requesting an advisory opinion regarding whether the public has the right to inspect and copy "Statement(s) of Deficiencies and Plan(s) of Correction" maintained by the Department of Health, Hospital and Medical Facilities Branch, which relate to adult residential care home facilities.

ISSUE PRESENTED

Whether the public has the right, under the Uniform Information Practices Act (Modified) ("UIPA"), chapter 92F, Hawaii Revised Statutes, to inspect and copy "Statement(s) of Deficiencies and Plan(s) of Correction" compiled by the Department of Health's Hospital and Medical Facilities Branch which concern adult residential care home facilities' compliance with regulations issued to protect the health, safety, and welfare of the residents of such facilities.

BRIEF ANSWER

Under the UIPA, we conclude that the public has the right to inspect and copy each "Statement of Deficiencies and Plan of Correction" compiled and maintained by the Department of Health, after deletion of information which would identify any resident

of an adult residential care facility, or their medical condition or history. Under the UIPA, individuals have a significant privacy interest in information relating to their "medical . . . history, diagnosis, condition, treatment or evaluation." Haw. Rev. Stat. . 92F-14(b)(1) (Supp. 1989). Based upon the facts presented, the public interest in disclosure is not sufficiently strong to outweigh an individual's privacy interest in such information, and therefore, disclosure of the names of the residents of such facilities and details relating to their medical condition or history would constitute a "clearly unwarranted invasion of personal privacy" under the UIPA. Given different facts, there could be instances where an agency must even disclose information regarding a resident's name, medical condition, or history "pursuant to a showing of compelling circumstances affecting the health or safety of any individual" or if the balance of interests tips in favor of public disclosure. Haw. Rev. Stat. . 92F-12(b)(3) and 92F-13(1) (Supp. 1989).

There is a significant public interest in determining whether an adult residential care home has complied with departmental rules enacted for the health, safety, and welfare of the facility's residents. Although these records have been compiled for law enforcement purposes, their disclosure would not frustrate legitimate government function under section 92F-13(3), Hawaii Revised Statutes, where the target of a potential law enforcement proceeding is in possession of that government record. However, similar law enforcement records not under consideration herein may be protected in the event that disclosure would, for example, reveal the identity of a confidential informant, or constitute a clearly unwarranted invasion of personal privacy.

FACTS

The Department of Health ("Department") licenses and regulates the operation of adult residential care homes pursuant to chapter 321, Hawaii Revised Statutes, and title II, chapter 100, Hawaii Administrative Rules. An adult residential care home ("ARCH") is:

[A]ny facility providing twenty-four-hour living accommodations, for a fee, to adults unrelated to the family, who require at least minimal assistance in the activities of daily living, personal care

services, protection, and health care services, but who do not need the professional health services provided in an intermediate, skilled nursing, or acute care facility.

Haw. Rev. Stat. . 321-15.1 (Supp. 1989).

As part of an ARCH facility's annual or semi-annual license renewal, representatives of the Department conduct an inspection of that ARCH's facility to determine whether it is in compliance with the Department's regulations and is otherwise protecting the health, safety, and welfare of its residents. If the licensee is found in violation of the Department's regulations, the licensee is issued a "Statement of Deficiencies" which describes each pertinent rule violation. Also contained in a "Statement of Deficiencies" is the facility's name, address, date of inspection, and the facility's administrator's signature. In response to this Statement, the licensee is required to submit a "Plan of Correction" to the Department for each violation. The "Plan of Correction" either provides that each violation has been corrected or contains a proposal for correction. The Statement of Deficiencies and Plan of Correction constitute one document and shall be referred to hereinafter as "Statement."

The Statement often contains the names of residents of an ARCH facility and details relating to their medical history, condition, or treatment. For example, the Statement may state that a resident has not had a current dental exam or that the resident's medications were incorrectly noted in the licensee's records. Specifically, an example of a "typical" Statement submitted for our review identified a resident and the particular medications prescribed by that resident's physician.

Other information contained in Statements submitted for our review noted that the facility's policies regarding residents' rights needed updating, that medications given to residents were not noted on a physician's order sheet, that there were inadequate means available to signal attendants at bedsides and in bathrooms, and that there were inadequate refrigeration facilities.

In the usual case, a licensee voluntarily corrects the violations listed in the Statement. However, in the event that the licensee fails to correct the violation, the Department may refuse to renew that facility's license.

The Executive Office on Aging is preparing a consumer's guide to choosing an ARCH facility and requests an advisory opinion concerning whether the public may inspect and copy the Statements as a source of information to consider in selecting an ARCH facility for themselves or another.

DISCUSSION

Under the UIPA, "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. . 92F-11(a) (Supp. 1989). Exceptions to this general rule of access are set forth at section 92F-13, Hawaii Revised Statutes.

Among other things, the UIPA does not require an agency to disclose "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. . 92F-13(1) (Supp. 1989). The application of this exception requires the balancing of interests:

Disclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual.

Haw. Rev. Stat. . 92F-14(a) (Supp. 1989).

Further, unless an individual's privacy interest is significant, "a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988). Section 92F-14(b), Hawaii Revised Statutes, enumerates examples of information in which an individual has a significant privacy interest and includes:

Information relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation

Haw. Rev. Stat. . 92F-14(b) (1) (Supp. 1989).

The Statements submitted for our review as examples of "typical Statements," contained information relating to the

medical history, condition, or treatment of identified residents. In the absence of a strong public interest in disclosure, information which would identify a particular ARCH resident's medical history, treatment, or condition should be deleted from these records before the public is permitted to inspect same. In the vast majority of cases, this may be accomplished by deleting that resident's name, unless the medical information is of a nature that would allow the identification of a particular resident. We do not believe that there is any strong public interest that would be furthered by the disclosure of this information based upon the facts presented here. The disclosure of other information concerning the ARCH's compliance with Department regulations as contained in the Statements would not "constitute a clearly unwarranted invasion of personal privacy" under the UIPA.

The UIPA also does not require an agency to disclose "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. . 92F-13(3) (Supp. 1989). Senate Standing Committee Report No. 2580, dated March 31, 1989, indicates that among other government records, "[r]ecords or information compiled for law enforcement purposes" need not be disclosed if such disclosure would result in the frustration of a legitimate government function.

Like section 92F-13(3), Hawaii Revised Statutes, Exemption 7 of the Federal Freedom of Information Act, 5 U.S.C. . 552, also protects "records or information compiled for law enforcement purposes," and thus, provides useful guidance in applying section 92F-13(3), Hawaii Revised Statutes. Federal courts have interpreted Exemption 7 in such a manner that federal agencies with civil law enforcement functions may claim its protection. See, e.g., Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73 (D.C. Cir. 1974). Likewise, we conclude that the Department, which is charged by statute with the enforcement of regulations affecting ARCH facilities, may claim the protection of the UIPA's provisions concerning "records or information compiled for law enforcement purposes" set forth in the Senate Standing Committee Report. However, under the UIPA, such records or information are not protected per se. Rather, their disclosure must also "frustrate a legitimate government function." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

Under Exemption 7, law enforcement records are protected only to the extent that disclosure would cause one of six specified harms enumerated in the exemption. Specifically, records or information compiled for law enforcement purposes are protected to the extent that disclosure:

(A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life of physical safety of any individual;

5 U.S.C. . 552(b)(7) (1988).

With respect to Exemption (7)(A), when this provision was amended in 1974, the sponsoring Senator explained that without the 1974 amendments, which substituted "investigatory records" for "investigatory files":

Such information as meat inspection reports, civil rights compliance information and medicare nursing home reports will be considered exempt under the seventh exemption.

Thus, in Goldschmidt v. United States Department of Agriculture, 557 F. Supp. 274 (D.D.C. 1983) the U.S. District Court for the District of Columbia concluded that inspection reports listing conditions in meat or poultry plants that an

inspector believed in violation of applicable laws and regulations were not protected from disclosure under Exemption 7. In Goldschmidt, the court noted that the purposes behind Exemption 7(A) did not apply to the inspection reports, reasoning:

No potential target of investigation or enforcement action seeks access to information not in its possession. The Department does not argue that the meat or poultry establishment is unaware of the conditions noted in the [report], or that disclosure of the [report] would somehow lead to alteration or destruction of evidence.

Goldschmidt, 557 F. Supp. at 277 (emphasis added).

Similarly, other authorities have concluded that Exemption 7(A) will generally not afford protection where the target of the investigation has possession of or submitted the information in question. See, e.g., Wright v. OSHA, 822 F.2d 642, 646 (7th Cir. 1987); Campbell v. HHS, 682 F.2d 256, 262 (D.C. Cir. 1982).

Other courts have ruled that "interference" has been established where, for example, the disclosure of the information could prevent the government from obtaining such data in the future. See, e.g., Nishnic v. Dept. of Justice, 671 F. Supp. 776, 794 (D.D.C. 1987) (disclosure of information would have chilling effect on sources who are employees of requester).

This exemption has also been properly invoked when disclosure would enable the target of an investigation to elude detection.

See Moorfield v. Secret Service, 611 F.2d 1021, 1026 (5th Cir. 1980), cert. denied, 449 U.S. 909 (1980). Indeed, one of the principal purposes behind Congress' adoption of Exemption 7(A) was to "prevent a litigant from utilizing FOIA to obtain premature access to the evidence and strategy to be used by the Government" in a law enforcement proceeding. Fedders Corp. v. F.T.C., 494 F. Supp. 325, 329 (D.C. N.Y. 1980).

Finally, a case under the State of Michigan's public records law, one factually similar to the question presented here, lends additional support to our legal conclusion. In Citizens for Better Care v. Reizen, 215 N.W.2d 576 (Mich. App. 1974), appeal denied, 219 N.W.2d 60 (1974), a public interest group sought access to "facility evaluation reports" prepared by the State's Department of Public Health as part of its inspection of nursing homes which were under consideration for

license renewal. The evaluation reports before the court in Reizen determined whether a nursing home was in compliance with rules and codes regarding sanitation, diets, and general care of patients. The Department of Public Health in Reizen asserted that the evaluations were protected from disclosure under an exemption to the public records law for "investigatory material compiled or used for regulatory or law enforcement purposes" and for "intra-agency memoranda." The Reizen court, while ordering the deletion of information that would identify patients in such facilities, also held that the remainder of the reports were subject to public inspection, reasoning:

The inapplicability of both these exceptions rests on the fact that both the field and facility evaluation reports are sent by the Deptment to the regulated nursing homes shortly after such reports are completed. Thus, the very information which defendants seek to shield from the public view is in the possession of those persons regulated, on behalf of the public, by the defendants. Under these circumstances, there can be no meritorious claim that the defendant agency is either protecting the integrity of its policy-making process or seeking to prevent the premature discovery, by the nursing homes, of information gathered for enforcement purposes.

Reizen, 215 N.W.2d at 584 (emphasis added).

Based upon federal and state case law, we conclude that the need for secrecy concerning the Statement compiled by the Department as part of a routine inspection disappears when a copy of the Statement itself is in the possession of the ARCH facility that is the potential target of an enforcement action.

Like the court in Goldschmidt, we do not see how public disclosure of these records would compromise a law enforcement investigation, deter the government from obtaining similar information in the future, or allow the target of the investigation to elude detection where, as here, that target is in possession of a copy of the law enforcement record.

Although not essential to our conclusion, we further observe that the elderly are an increasingly growing segment of Hawaii's population and that consumer interest among this segment of our society concerning programs that serve their

physical, economic, and social needs is at a zenith. There is significant public interest in the track record of institutions which care for the elderly and whether they have complied with laws that protect the health, safety, and welfare of the aged.

Accordingly, we conclude that although the Statements compiled by the Department concerning ARCH facilities are "records or information compiled for law enforcement purposes," their disclosure would not "frustrate a legitimate government function" under the UIPA. We do not mean to suggest by this conclusion where other factors mentioned in Exemption 7(B)-(F) of FOIA are present, that these or similar law enforcement records would not be protected under section 92F-13(3), Hawaii Revised Statutes. We merely conclude that those circumstances do not appear to be present as to the Statements provided for our review.

The UIPA also does not require an agency to disclose "[g]overnment records which, pursuant to state or federal law . . . are protected from disclosure." Haw. Rev. Stat. . 92F-13(4) (Supp. 1989). Our research could find no state statute which declares that the information contained in the Statements is confidential. However, we would advise you to consult federal laws affecting ARCH facilities which might provide some measure of protection to these records or the information which they contain.

CONCLUSION

The Statements compiled by the Department concerning ARCH facilities' compliance with licensing laws enacted to protect the health and safety of residents of such facilities are public, except for those portions that are protected from disclosure under section 92F-13(1), Hawaii Revised Statutes. In this situation, there is no strong public interest that would be served by disclosure of information concerning a particular resident's medical history, condition, or treatment and therefore, we conclude that disclosure of this information would constitute "a clearly unwarranted invasion of personal privacy" under the UIPA. Accordingly, the identity of these residents, and all information which would serve to identify them, should be deleted before inspection or copying by the public. We note, however, that given different facts, there could be instances where an agency must even disclose information regarding the resident's name, medical condition, or history "pursuant to a

showing of compelling circumstances affecting the health or safety of any individual" or if the balance of interests tips in favor of public disclosure. Haw. Rev. Stat. .. 92F-12(b)(3) and 92F-13(1) (Supp. 1989).

Further, we conclude that the remaining portions of the Statements are not protected from disclosure under section 92F-13(3), Hawaii Revised Statutes. Although these records have been "compiled for law enforcement purposes," to the extent that they are routinely disclosed to the alleged violator or licensee, we do not believe that public inspection would result in "the frustration of a legitimate government function" under the UIPA, based upon the facts presented here.

Accordingly, after information in the Statements which would identify a particular ARCH facility resident has been deleted from these records, they must be available for public inspection and copying under the UIPA.

Hugh R. Jones
Staff Attorney

HRJ:sc
cc: The Honorable John C. Lewin, M.D.
Director of Health

APPROVED:

Kathleen A. Callaghan
Director